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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 77-230

GERALDINE C. MEDINA, Petitioner,

v.

WARREN B. RUDMAN, DAVID HESS, ROBERT E. ALLARD, SYDNEY H. FRINK, and SOTERIOS A. SAGGIOTES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE PETITIONER, GERALDINE C. MEDINA

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IN THE SUPREME COURT OF THE UNITED STATES

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NO. 77-230

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v.

WARREN B. RUDMAN, DAVID HESS, ROBERT E. ALLARD, SYDNEY H. FRINK, and SOTERIOS A. SAGGIOTES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE PETITIONER, GERALDINE C. MEDINA

Petitioner, Geraldine C. Medina, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the United States District Court for the District of New Hampshire dismissing Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (A. 2) is reported at 545 F. 2d 244 (1977). The opinion of the United States District Court for the District of New Hampshire was rendered on January 9, 1976. (A. 14).

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on November 19, 1976 (A. 1).

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 2101(c), this being a writ for review of a judgment of the United States Court of Appeals in a civil action.

QUESTIONS PRESENTED

THE DISMISSAL OF A COMPLAINT FOR ALLEGED FAILURE TO STATE A CLAIM IS IMPROPER WHERE PLAINTIFF IS SEEKING TO PARTICIPATE IN AN ALREADY OUTSTANDING GREY-

HOUND RACING LICENSE IN THE STATE OF NEW HAMPSHIRE AND WHERE HER SOLE COMPLAINT IS THAT SHE HAS BEEN DENIED A DUE PROCESS HEARING ON HER APPLICATION ALTHOUGH SHE IS UNQUESTIONABLY QUALIFIED AND HAS MET EVERY STATUTORY REQUIREMENT.

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT, UNITED STATES CONSTITUTION, AND FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION (A. 38).

STATUTES

TITLE 42 USC §1983 (A. 38). N.H. RSA 284:6-a; 12-a; 15-a; 15-b; 16-a (A. 24 - A. 26).

STATEMENT OF THE CASE

Petitioner, Geraldine C. Medina, an Ohio resident, sued in the District Court for the District of New Hampshire, seeking to restrain Defendants Allard, Frink and Saggiotes, members of the New Hampshire Greyhound Racing Commission (the "Commis-

sion"), and Defendants, New Hampshire Attorney General Rudman and Assistant Attorney General Hess, from denying <u>without a hearing</u> her application to participate in a previously existing greyhound racing license in the State of New Hampshire. Mrs. Medina requested the District Court (A.37; A.27) to order the Commission to grant her a hearing on her application for participation (by purchasing stock in the licensee) in an outstanding greyhound racing license that the Commission had issued to a corporation known as the New Hampshire Kennel Club, Inc. (the "Club"). On advice of the attorney general of New Hampshire, the Commission refused to approve Mrs. Medina "as a financial backer, owner or participant in any way" under the Club's license (A. 33).

The State Greyhound Racing Commission is a three-member body established

under New Hampshire law NH RSA 284:6-a (Supp. 1975)(A. 24). No one may conduct, hold or operate any dog race or public meet at which parimutuel pools are sold without a license from the Commission. NH RSA 284:12-a (Supp. 1975)(A. 24). If the Commission is satisfied that all provisions of law and its rules and regulations have been and will be complied with, it may issue a license, NH RSA 284:16-a (Supp. 1975)(A. 26).

Applicants for dog racing licenses, holders of such licenses, and individuals owning interests in closely-held licensee corporations, must file with the state Attorney General sworn statements disclosing their names, occupations and addresses, the nature of their ownership interest in the license, information as to any felony convictions, and a detailed statement of assets and liabilities. NH RSA 284:15-b

(Supp. 1975)(A. 25). New Hampshire law makes no explicit provision for a prospective purchaser of stock in an existing licensee like Mrs. Medina to file such a statement with the Attorney General as was done here, nor does the law expressly prohibit one who has not received Commission approval from purchasing stock.

The events surrounding Petitioner's claim are as follows. Petitioner, an Ohio resident, is the principal shareholder of four Weight Watcher franchises there. In the first half of 1975 she loaned $150,000 to the Club, which owned the New Hampshire real estate upon which a greyhound racing track was then in process of being built. A license to conduct greyhound races during the 1975 season had already been issued to the Club. After Petitioner's initial loan, the Club's two principal stockholders, Henry D. Bogatin, Jr. and

Angelo Cassaro, assured Petitioner that they would sell her an approximately fifty per cent interest in the Club, but their undertaking to do so was explicitly made contingent upon her obtaining approval from the Commission. Pursuant to this informal understanding "in principle", but before she had obtained the Commission's approval, Mrs. Medina loaned more money to the Club, making her investment in the neighborhood of $700,000.

In August, 1975, Mrs. Medina, with the assistance of an attorney, made out and submitted to the Attorney General a form entitled "Individual Disclosure of Information", this being what Mrs. Medina calls in her complaint "an application to participate in the previously issued [Club's] Greyhound Racing license". The form on its face provided that it was "To be submitted to Attorney General under

RSA 284:15-b" and "Must be filed by each individual . . . holding legal or beneficial ownership interest if the ownership interest of the above applicant or license holder is held by 25 or less persons . ."

On this form, Mrs. Medina indicated the Club as the "present license holder", and that she was presently a mortgagee of the Club which was indebted to her for $700,000. After detailing her financial condition, she went on to indicate that if approved by the Commission she hoped to participate through a limited partnership arrangement, and through stock ownership in the Club, which would be the General Partner, in the operation of a greyhound racing facility. Stock ownership in the Club "presently anticipated" was said to be as follows:

VOTING COMMON

Henry D. Bogatin, Jr.	200 shares
Angelo Cassaro	200 shares
Geraldine Medina	300 shares

NON VOTING COMMON

Geraldine C. Medina 300 shares

Petitioner expressly noted that "voting control would remain in the hands of the present stockholders of the present licensee", viz. Bogatin and Cassaro.

There is no suggestion that Petitioner ever intended personally to secure a license. Moreover, since the existing stockholders, Bogatin and Cassaro, were to retain over 50% of the voting stock, the license issued to the Club would not "automatically cease" under the provisions of NH RSA 284:16-a, upon Mrs. Medina's acquisition of stock (A. 26).

The Court of Appeals, in according Mrs. Medina the status of a license applicant (A. 5), Opinion of the Court of Appeals, Page 4, Footnote 3), was in error. In part this is due to the fact that the New Hampshire statutes do not adequately

provide how applications like that of the Petitioner's fit in the regulations of licensing procedures.

Following submission of the application, the state Attorney General conducted an investigation and, on September 26, 1975, the Commission wrote to the Club that "[b]ased upon a report from the office of the Attorney General, the Commission declines to approve Geraldine C. Medina as a financial backer, owner or participant in any way under the license granted to the New Hampshire Kennel Club." (A. 33). Twelve days later, on October 7, 1975, Mrs. Medina filed an action in the district court, seeking initially a temporary restraining order and preliminary injunction ordering defendants to allow her to participate under the Club's license.

Petitioner alleged in Paragraph Eight of her Complaint (A. 27) that the "provi-

sions of the New Hampshire Revised Statutes Annotated fail to provide Plaintiff with adequate notice and hearing on the merits of a controversy between herself and the unknown contents of the report prepared by Defendants, Warren B. Rudman and David Hess. Said deprivation constitutes a denial of due process of law as set forth in the Constitution of the United States." At the December 5, 1975, hearing on Defendants motions for dismissal and for summary judgment, Petitioner clarified the relief she was seeking (A. 37):

> "'The Court: What do you mean by further equitable relief?
>
> "'Mr. Yelsky: Well, all right. This is exactly what I mean. We have very carefully brought to the Court's attention that this woman has never been given a hearing or notice or an explanation of why she has not been licensed, although we feel that she has complied in every way with the State law and that she should be licensed.
>
> "'The Court: All right. Are

you asking that she be given a hearing?

"'Mr. Yelsky: That is the further equitable relief, Your Honor.'"

Finally, in her district court complaint, at Paragraph 15, Petitioner alleged that "subsequent to plaintiff's application to be licensed to participate in said Club license" the Attorney General conducted "some type of investigation" in which she cooperated; and that although the results of the investigation were kept secret from her, she believed this to be the basis for turning her down. She alleged that "she has a reputation unblemished in any way" and complies with "any of the standards as set forth in New Hampshire Revised Statutes Annotated, Chapter 284 and all related sections thereto." (A. 28; A. 29, para. 16).

Jurisdiction in the District Court was based on 28 U.S.C. §1343 Subdivisions

(1), (2), (3) and (4), providing for original jurisdiction in suits authorized by 42 U.S.C. §1982, §1983 and §1985.

The Court of Appeals affirmed the district court's dismissal of the Petitioner's Complaint. It is these adverse decisions from which relief is sought here.

REASONS FOR GRANTING THE WRIT

The First Circuit has decided an important question of federal law in a manner which conflicts with important decisions of other circuits.

ARGUMENT

THE DISMISSAL OF A COMPLAINT FOR ALLEGED FAILURE TO STATE A CLAIM IS IMPROPER WHERE PLAINTIFF IS SEEKING TO PARTICIPATE IN AN ALREADY OUTSTANDING GREYHOUND RACING LICENSE IN THE STATE OF NEW HAMPSHIRE AND WHERE HER SOLE COMPLAINT IS THAT SHE HAS BEEN DENIED A DUE PROCESS HEARING ON HER APPLICATION ALTHOUGH SHE IS UNQUESTIONABLY QUALIFIED

AND HAS MET EVERY STATUTORY REQUIREMENT.

The action of the Greyhound Racing Commission in arbitrarily and without hearing denying Petitioner the opportunity to participate in a dog racing license in the State of New Hampshire, subsequent to her being offered a limited partnership and substantial equity in the New Hampshire Kennel Club violated her right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. The guise for this action was the administrative application of certain statutes which are constitutionally lacking. These statutes no where provide for fair hearing for an applicant such as Petitioner (A.26).

In her Complaint, Petitioner stated that she had invested an approximate Seven Hundred Thousand Dollars ($700,000.00) in the already licensed New Hampshire Kennel Club; that said money was essential to the

continued operation of said business and that without it the continued existence of the Club and existing license would be jeopardized; the track subjected to foreclosure; and, Petitioner's loan endangered. (A. 29).

As the District Court pointed out (A.19), Memorandum Opinion), the denial of those privileges of which Petitioner complains, "the right to earn a living and the right to engage in the occupation of one's choice" are within "the range of protectible interests" of the Fourteenth Amendment. Schware v. Board of Bar Examiners, 353 US 332 (1957). However, the District Court's conclusion that she "does not seek nor is she being prevented from either earning a living or engaging in a chosen occupation" is without substance.

Applicants for licenses have been

found to have protectable interests even though the claimants are mere applicants. In Raper v. Lucey, 488 F. 2d 748 (1973), the First Circuit found that a driver's license applicant has a protected liberty interest in the "freedom to make use of one's own property, here a motor vehicle."

In Hornsby v. Allen, 326 F. 2d 605 (1964), the Fifth Circuit found that an applicant for a liquor license is entitled to due process.

In Homer v. Richmond, 292 F. 2d 719 (D.C. Cir. 1961), in which radio telegraph operators had unsuccessfully sought licenses made necessary by a newly enacted statute, the Circuit Court found that once an operator meets the statutory criteria, he is entitled to a due process hearing to meet charges of unsuitability.

The lower court's distinguishing of Petitioner's situation from those in the

cases above cited on the basis that those cases involve broadly shared privileges is nonsense. All involve the right to pursue a chosen career. The liquor situation in Hornsby v. Allen, supra, is no less a social problem than dog racing is made out to be in the lower courts and is no less a subject of the state's police power.

Petitioner's means have no bearing in this situation. Doubtless, her means do not diminish her due process rights.

The decision of the District Court gives the Commission unbridled discretion in choosing who they want to be licensed. Such a situation is repleat with the potential for abuse.

Finally, there can be no dismissal for failure to exhaust available state remedies. The available administrative procedures would probably not have re-

sponded to Petitioner's demand for procedural due process in that she never had a hearing from the start. Moreover, a series of recent Supreme Court decisions, Carter v. Stanton, 405 U.S. 669, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1971) (Per curiam); Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971)(per curiam); Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968) (per curiam); have led many lower federal courts to conclude that such a requirement is no longer necessary in §1983 cases.

CONCLUSION

Based on all of the foregoing arguments, Petitioner, Geraldine C. Medina, respectfully requests that her Petition be granted.

Respectfully submitted,

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A P P E N D I X

I. JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 76-1057.

GERALDINE C. MEDINA,
Plaintiff, Appellant,

v.

WARREN B. RUDMAN ET AL.,
Defendants, Appellees.

JUDGMENT

Entered November 19, 1976

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

/s/ Dana H. Gellup
Clerk

[cc: Messrs. Yelsky and Souter.]

II. OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

United States Court of Appeals for the First Circuit

No. 76-1057

GERALDINE C. MEDINA,
PLAINTIFF, APPELLANT,
v.
WARREN B. RUDMAN, ET AL.,
DEFENDANTS, APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. HUGH H. BOWNES, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Leonard W. Yelsky, with whom *David A. Snow* and *Yelsky, Eisen & Singer Co., L.P.A.* were on brief, for appellant.
David H. Souter, Attorney General, with whom *Thomas D. Rath*, Deputy Attorney General, and *James C. Sargent, Jr.*, Attorney, were on brief, for appellees.

November 19, 1976

CAMPBELL, *Circuit Judge*. Geraldine C. Medina appeals from a judgment of the District Court for the District of New Hampshire dismissing her complaint for damages and an injunction against the members of New Hampshire's State Greyhound Racing Commission (the "Commission") and its Attorney General. Citing 42 U.S.C. §§ 1982, 1983, 1984, and 1985, Mrs. Medina requested the district court to order the Commission to approve her "participation" (by purchasing stock in the licensee) in an outstanding greyhound racing license that the Commission had issued to a corporation known as the New Hampshire Kennel Club, Inc. (the "Club"). Her complaint followed upon the Commission's refusal, on advice of the Attorney General of New Hampshire, to approve her "as a financial backer, owner or participant in any way" under the Club's license.[2]

While Mrs. Medina's complaint cited several civil rights statutes, and included an unsuccessful request for a three-judge court to consider the alleged unconstitutionality of parts of New Hampshire's greyhound racing laws, this appeal is limited to the district court's determination that her complaint did not state a claim under 42 U.S.C. § 1983. Mrs. Medina contends chiefly that the Commission's disapproval of her participation without, as she asserts, "adequate notice and hearing on the merits of a controversy between herself and the unknown contents of the [Attorney General's] report", deprived her of due process of law under the fourteenth amendment, giving rise to a right of action under § 1983. The court below ruled that her in-

[1] The State Greyhound Racing Commission is a three-member body established under New Hampshire law NH RSA 284:6-a (Supp. 1975). No one may conduct, hold or operate any dog race or public meet at which parimutuel pools are sold without a license from the Commission. NH RSA 284:12-a (Supp. 1975). If the Commission is satisfied that all provisions of law and its rules and regulations have been and will be complied with, it may issue a license, NH RSA 284:16-a (Supp. 1975). [Emphasis supplied.]

[2] Applicants for dog racing licenses, holders of such licenses, and individuals owning interests in closely-held licensee corporations, must file with the state Attorney General sworn statements disclosing their names, occupations and addresses, the nature of their ownership interest in the licensee, information as to any felony convictions, and a detailed statement of assets and liabilities. NH RSA 284:15-b (Supp. 1975). New Hampshire law makes no explicit provision for a *prospective* purchaser of stock in an existing licensee like Mrs. Medina to file such a statement with the Attorney General as was done here, nor does the law expressly prohibit one who has not received Commission approval from purchasing stock.

terest in acquiring stock in a parimutuel greyhound racetrack was not protected liberty or property within the fourteenth amendment.

Before proceeding, we observe that the court below should either have treated defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) as one for summary judgment, or else not given specific consideration, as it did in its opinion, to a number of facts outside the pleading, found principally in affidavits filed by the parties. *See* Fed. R. Civ. P. 12(b). *O'Brien* v. *DiGrazia*, No. 76-1292 (1st Cir. Nov. 8, 1976). Rule 12(b) provides that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." (The court had before it a separate motion for summary judgment that was argued simultaneously with the 12(b)(6) motion but chose to act under the latter.) The court's error was, however, harmless. The dismissal can be justified without reference to the extrinsic material which, while relevant, is not determinative. *Cf. O'Brien* v. *Moriarty*, 489 F.2d 941 (1st Cir. 1974).

The events surrounding plaintiff's claim are clear enough. An Ohio resident, plaintiff is the principal shareholder of four Weight Watcher franchises there, and appears to possess substantial means. In the first half of 1975 she loaned $150,000 to the Club, which owned the New Hampshire real estate upon which a greyhound racing track was then in process of being built. A license to conduct greyhound races during the 1975 season had already been issued to the Club. After plaintiff's initial loan, the Club's two principal stockholders, Henry D. Bogatin, Jr. and Angelo Cassaro, assured plaintiff that, in view of her substantial financial position, they would sell her an approximately fifty per cent interest in the Club, but their undertaking to do so was explicitly made contingent upon

her obtaining approval from the Commission. Pursuant to this informal understanding "in principle", but before she had obtained the Commission's approval, Mrs. Medina loaned more money to the Club, making her investment in the neighborhood of $700,000.

In August, 1975, Mrs. Medina, with the assistance of an attorney, made out and submitted to the Attorney General a form entitled "Individual Disclosure of Information", this being what Mrs. Medina calls in her complaint "an application to participate in the previously issued [Club's] Greyhound Racing license". The form on its face provided that it was "To be submitted to Attorney General under RSA 284:15-b" and "Must be filed by each individual . . . holding legal or beneficial ownership interest if the ownership interest of the above applicant or license holder is held by 25 or less persons . . . ."[3]

On this form, Mrs. Medina indicated the Club as the "present license holder", and that she was presently a mortgagee of the Club which was indebted to her for $700,000. After detailing her financial condition, she went on to indicate that if approved by the Commission she hoped to participate through a limited partnership arrangement, and through stock ownership in the Club, which would be the General Partner, in the operation of a

[3] The district court spoke of Mrs. Medina as an applicant for a racetrack license. Clearly, as the court acknowledged, this was not technically correct as there is no suggestion that she ever intended personally to secure a license. Moreover, since the existing stockholders, Bogatin and Cassaro, were to retain over 50% of the *voting* stock, the license issued to the Club would seem not to "automatically cease" under the provisions of NH RSA 284:16-a, upon Mrs. Medina's acquisition of stock, as the district court assumed.

On the other hand, calling Mrs. Medina a license applicant is, as a practical matter, not too far off the mark. The Club's license was subject to annual renewal and could be revoked at any time by the Commission (though only "for cause upon reasonable notice and hearing", NH RSA 284:16-a); and it appears that if Mrs. Medina persisted in acquiring stock without Commission approval, its license would be in jeopardy under existing Commission policy and practice. For purposes of this case, we are willing to accord Mrs. Medina the most favored status supported by the pleadings, that of a license applicant, particularly where the pleadings do not indicate how applications like hers fit in the regulations of regular licensing procedures.

greyhound racing facility. Stock ownership in the Club "presently anticipated" was said to be as follows:

VOTING COMMON

Henry D. Bogatin, Jr.	200 shares
Angelo Cassaro	200 shares
Geraldine Medina	300 shares

NON VOTING COMMON

Geraldine C. Medina	300 shares

Plaintiff expressly noted that "voting control would remain in the hands of the present stockholders of the present licensee", viz. Bogatin and Cassaro.

Following submission of the so-called application, the state Attorney General conducted an investigation and, on September 26, 1975, the Commission wrote to the Club that "[b]ased upon a report from the office of the Attorney General, the Commission declines to approve Geraldine C. Medina as a financial backer, owner or participant in any way under the license granted to the New Hampshire Kennel Club." There is no allegation or evidence that Mrs. Medina at this juncture ever requested a Commission hearing.[4] But twelve days later, on October 7, 1975, she filed this action in the district court, seeking initially a temporary restraining order and preliminary injunction, which the court denied, ordering defendants to allow her to participate under the Club's license.[5]

[4] As we agree with the district court that the fourteenth amendment afforded Mrs. Medina no right to a hearing, we need not consider the effect of her failure to allege such a request.

[5] Neither in the prayers of her complaint nor in her request for preliminary relief, did Mrs. Medina make specific request for the "process", i.e. notice of charges and opportunity for hearing, the omission of which allegedly constituted a denial of due process of law. In argument to the district court, her attorney finally came round to stating that, as alternate relief, she wished a hearing and disclosure of the basis on which the Attorney General disapproved her and the court said it considered this a motion to amend and allowed it.

In her district court complaint, plaintiff alleged that "subsequent to plaintiff's application to be licensed to participate in said Club license" the Attorney General conducted "some type of investigation" in which she cooperated; and that although the results of the investigation were kept secret from her, she believed this to be the basis for turning her down. She alleged that "she has a reputation unblemished in any way" and complies with "any of the standards as set forth in New Hampshire Revised Statutes Annotated, Chapter 284 and all related sections thereto." Plaintiff further alleged, in conclusory fashion, that defendants acted willfully, knowingly and improperly with the specific intent to deprive her of her constitutional rights, and that they conspired and acted arbitrarily, in abuse of their discretion.

In deciding whether Mrs. Medina had a claim cognizable under § 1983, the court below assumed that the only federal right that might arguably have been denied her by New Hampshire officials, under color of state law, was a right to due process.[6] The court focused on that question, rightly we think. There was clearly no issue of contract impairment under Art. I, § 10 of the Constitution, New Hampshire's greyhound racing laws being fully extant before she loaned money to the Club, *South Terminal Corp. v. EPA*, 504 F.2d 646, 680 (1st Cir. 1974); nor is there any equal protection issue, there being insufficient facts alleged to indicate a "purposeful discrimination" by state officials. *Snowden v. Hughes*, 321 U.S. 1 (1944); *see Cordeco Development Corp. v. Santiago Vasquez*, Nos. 75-1424, 1457, slip op. 7, n.5 (1st Cir. June 25, 1976); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (Hand, J.).

The district court's due process analysis closely relied upon that in *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Supreme Court said,

[6] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const. amend. XIV, § 1.

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> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property . . . . [T]he range of interests protected by procedural due process is not infinite." *Id.* at 569-70.

The court went on to quote from *Roth* that to have a protected property interest in a benefit, a person must have more than an "abstract need or desire". Property interests

> "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that supports claims of entitlement to those benefits." *Id.* at 577.

The court found that Mrs. Medina lacked any such property interest here "cognizable under state law, rules, custom, or understanding. State law does not create any property interest in racetrack license applicants; the law is expressly permissive. . . . Neither can plaintiff claim any 'understanding'. In her contractual dealings with the Kennel Club, she expressly acknowledged the statutory necessity of obtaining a license in order to participate in the operation of the racetrack."

The district court rejected any notion that Mrs. Medina's application involved a "fundamental" or "natural" right — such as the right to earn a living and engage in one's chosen occupation — which might, apart from state law, be a protected "liberty" interest. *See Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Finally it distinguished various license cases, including *Raper* v. *Lucey*, 488 F.2d 748 (1st Cir. 1973) (driver's license), on the ground that they involved broadly-shared privileges essential in the pursuit of a livelihood. The court accordingly ruled that the guarantees of the due process clause were simply inapplicable and that, as a consequence, plaintiff had no claim under § 1983.

We agree with the district court. While the great variety and range of protected liberty and property interests make them difficult to classify, we accept the lower court's thesis that a person's interest in participating in the ownership of a parimutuel greyhound racetrack is neither a right recognized under New Hampshire law nor is it a "fundamental" or "natural" right.

In the recent term, after the district court's decision in the present case, the Supreme Court has come down with several decisions reiterating and narrowing the *Roth* formulation. *Paul* v. *Davis*, 424 U.S. 693 (1976); *see Meachum* v. *Fano*, 44 U.S.L.W. 5053 (June 25, 1976); *Bishop* v. *Wood*, 44 U.S.L.W. 4820 (June 10, 1976). *See also Kelley* v. *Johnson*, 425 U.S. 238 (1976). While the Supreme Court in these cases recognized in passing the existence of a class of "fundamental" liberties (said to trigger "substantive" rather than merely "procedural" protection, *see Kelley* v. *Johnson, supra*, at 244; *Paul* v. *Davis, supra*, at 710 n.5, 712-13), the Court defined this class rather narrowly,[7] reserving particular emphasis for those "liberty" or "property" interests which attain status as such under the due process clause "by virtue of the fact that they have been initially recognized and protected by state law". *Paul* v. *Davis, supra*, at 710. The Court

[7] *See* dissenting opinions in *Paul* v. *Davis*, 424 U.S. 693, 714 (1976) (Brennan, J.); *Meachum* v. *Fano*, 44 U.S.L.W. 5053, 5058 (Stevens, J.). The "fundamental" liberties acknowledged by the Court were chiefly those having to do with marriage, procreation, contraception, family relationships and child rearing and education. *Paul* v. *Davis, supra*, at 712-13. The Court has, of course, also acknowledged the rights created by other provisions of the Constitution. *Id.* at 710 n.5.

said it is the alteration or extinguishing of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause. *Id.* at 711.

Under this approach, it is difficult to see how New Hampshire law can be said to recognize or create a vested right or status in favor of potential greyhound license applicants which defendants here are taking away. Doubtless once a license, or the equivalent, is granted, a right or status recognized under state law would come into being, and the revocation of the license would require notice and hearing as, indeed, New Hampshire law now provides. *See Paul* v. *Davis, supra,* at 710-11; *Bell* v. *Burson,* 402 U.S. 535 (1971). But nothing has so far been promised or granted by the state to Mrs. Medina.

A state-recognized interest might also exist if the New Hampshire racing law could be said to confer upon Mrs. Medina a right, upon equal terms with others generally, to be licensed so as to engage in a common activity or pursuit. In distinguishing *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), the *Paul* Court said that "the right to purchase or obtain liquor in common with the rest of the citizenry" was a right held under state law. *Paul* v. *Davis, supra,* at 708; and it seems likely that when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists. The case of *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957), finding a right of due process with respect to bar admissions, can be explained on such a ground (as well as on the ground that the right to pursue an ordinary occupation is, by itself, a "fundamental" liberty interest, *infra*). This circuit has held that obtaining a driver's license is subject to due process protection, *Raper* v. *Lucey,* 488 F.2d 748 (1st Cir. 1973), and the same has

been held in another circuit with respect to a radio operator's license. *Homer* v. *Richmond,* 292 F.2d 719 (D.C. Cir. 1961). In these cases, the government recognized an entitlement in favor of all persons, or of a class, upon terms and conditions of general application.

But racing licenses have not been viewed by the New Hampshire courts as open to all persons who meet prescribed standards. Rather they are treated as discretionary with the racing Commission. The statute says only that the Commission "*may*" issue a license if satisfied that all provisions of law and its rules and regulations have been and will be complied with. NH RSA 284:16-a (Supp. 1975). Referring to a horse racing license, the New Hampshire Supreme Court has rejected a claim that once an applicant complies with the statutes and meets all requirements, the commission had no discretion to withhold a license. *North Hampton Racing & Breeding Assoc.* v. *New Hampshire Racing Commission,* 94 N.H. 156 (1946). The court explained that the state horse racing statute, on which the greyhound racing laws are patterned

> "deals with a private enterprise which, of its nature, is not only privileged, but which presents a social problem properly coming under the exercise and jurisdiction of the police power of the State and which requires strict regulation and supervision." *Id.* at 159.

In *Ratti* v. *Hinsdale Raceway,* 109 N.H. 270, 272 (1969), the court said that racetracks were permitted by the state to raise revenue, and that regulation allowed tracks to be run by private parties while guarding against "whatever social evils may be involved."

We think that New Hampshire, in its greyhound licensing laws, rather than creating a general entitlement

in favor of all persons who qualify, has indicated merely that the Commission may issue licenses "at will". *Cf. Bishop* v. *Wood, supra*; *Board of Regents* v. *Roth, supra.* We conclude, therefore, that Mrs. Medina's desire to participate in the ownership of a greyhound parimutuel track did not enjoy, either explicitly or implicitly, a protected status under New Hampshire law, and was not on that theory, a "liberty" or "property" interest.

Not being state-created, any asserted "right" to participate in the racetrack comes under the due process clause only if it is a right so "fundamental" as to elicit protection even though not otherwise defined in state law. Rights of this potency are a special breed, *see* note 7, *supra,* and we find little authority for so classifying Mrs. Medina's wishes. Over fifty years ago, in *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923) the Supreme Court described the right "to engage in any of the common occupations of life" as one of the fundamental privileges "long recognized at common law as essential to the orderly pursuit of happiness by free men." *See Schware* v. *Board of Bar Examiners, supra. Meyer* has recently appeared mostly in dissenting opinions; but even assuming its continued vitality, we do not consider racetrack ownership to be one of life's "common occupations". Gambling is traditionally suspect in our society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of supervision.

We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis as it has chosen to do here.[8] Given the social evils associated

[8] While vesting discretionary powers in a state commission may open the way to abuse, a state may reasonably believe that discretionary control makes it easier to see that licenses do not fall into the wrong hands and that only persons who will act affirmatively in the public interest obtain licenses. *Cf. Kelley* v. *Johnson, supra,* at 247. New Hampshire law does provide a remedy by which an aggrieved party may appeal to the state courts to challenge Commission decisions deemed arbitrary. NH RSA 284:13 (Supp. 1975).

with gambling and the state's revenue interests, the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors. We do not decide if and to what extent a similar analysis would stand up if applied to another type of enterprise. *Cf. South Gwinnett Venture* v. *Pruitt,* 491 F.2d 5 (5th Cir.) *cert. denied* 419 U.S. 837 (1974); *Atlanta Bowling Center, Inc.* v. *Allen,* 389 F.2d 713 (5th Cir. 1968); *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1963).

Affirmed.

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III. MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Geraldine C. Medina	)	
	)	
v.	)	
	)	
Warren B. Rudman,	)	Civil Action No. 75-297
David Hess,	)	
Robert E. Allard,	)	
Sydney H. Frink, and	)	
Soterios A. Saggiotes	)	

MEMORANDUM OPINION

Plaintiff has brought suit against the New Hampshire Greyhound Racing Commission, the New Hampshire Attorney General and one of his assistants alleging violations of 42 U.S.C. §§ 1982, 1983, 1984 and 1985. She further claims that NH RSA 284:6-a, 12-a, 15-a, 15-b and 16-a have been unconstitutionally applied as to her; she seeks the convening of a Three-Judge Court to declare the application of these statutes unconstitutional and to enjoin enforcement of them.

She complains that the New Hampshire Greyhound Racing Commission has refused, without a hearing or statement of reasons, to approve her participation in any way in a license previously granted to others for the operation of a Greyhound race track. She alleges that such refusal contravenes her constitutional right under the Fourteenth Amendment to a due process hearing and that, as a consequence, she has been deprived of her constitutional rights to earn a living, to purchase and hold real and personal property, and to enter into contracts. Plaintiff further

alleges that defendants conspired together to deny her these constitutional rights.

Jurisdiction is claimed under 28 U.S.C. § 1343.

Plaintiff is a resident of Ohio and the franchise holder of Weight Watchers, Inc., for approximately fifteen counties in that state. Her annual income is approximately $450,000. (Plaintiff's Affidavit at i.)

Defendants Robert Allard, Sydney H. Frink, and Soterios A. Saggiotes are the duly appointed members of the New Hampshire Greyhound Racing Commission. As such, they are empowered to license all persons, associations, and corporations which wish to conduct Greyhound racing in the State of New Hampshire. NH RSA 284:12-a (Supp. 1975); NH RSA 284:16-a (Supp. 1975).

Defendant Warren B. Rudman is the Attorney General of the State of New Hampshire, and defendant David Hess was, at all times pertinent to this action, one of his assistants. Rudman is the chief law enforcement officer of New Hampshire, and, as such, he routinely cooperates with the New Hampshire Greyhound Racing Commission in conducting in-depth investigations of license applicants. (Rudman Affidavit, Oct. 16, 1975, at 1.) Defendant Hess conducted the investigation into the personal and business background of plaintiff. (Hess Affidavit, Oct. 17, 1975, at 1.)

Plaintiff initially sought a preliminary injunction ordering defendants to issue her a Greyhound racing license. This was denied after a hearing. Defendants, jointly and severally, have moved for dismissal of the action under F.R.C.P. 12 (b) (6) or, in the alternative, for summary judgment. Plaintiff has moved to compel discovery. I find defendants' motion to dismiss dispositive and do not reach the other motions.

Plaintiff alleges that in the spring of 1975, she entered into a contract with the two principal shareholders of the New Hampshire Kennel Club, a duly licensed Greyhound race track operator, and, as a business investment, loaned $700,000 to the Kennel Club. She claims that "it would be advantageous for [her] to invest in this business as it would concern a real estate investment which would provide a legal tax shelter for [her] large

income." (Plaintiff's Affidavit at i.) The two principal shareholders in the Kennel Club agreed to sell to plaintiff an approximate fifty percent interest in the Club provided that she was approved as a licensee by the New Hampshire Greyhound Racing Commission. (Complaint ¶ 11 at 7.)

In August, 1975, plaintiff filed an application with the Racing Commission. Pursuant to its custom, the Commission submitted plaintiff's name to the Attorney General for an in-depth investigation of her personal and business background. (Affidavit, Allard, Frink and Saggiotes, Oct. 16, 1975, at 2.) On the basis of his investigation, Rudman was unable to "report favorably," to the Commission on the application. (Affidavit, Rudman, Oct. 16, 1975, at 3.) In September, 1975, the Commission denied plaintiff's application without giving her a hearing or the reasons for the denial, and subsequently she filed her complaint in this court.

Plaintiff's complaint is a hodge podge of allegations running the entire gamut of the Civil Rights Act. She alleges that defendants have deprived her of her Fifth and Fourteenth Amendment rights to earn a living, to purchase and hold real and personal property, to freely enter into contracts, and to participate in a license. She alleges further that they have deprived her of these rights and her property without due process of law. She claims that defendant members of the Racing Commission illegally delegated their authority to defendant Rudman, that all defendants exceeded the scope of their authority and acted in an arbitrary and abusive manner, and that this was done pursuant to a conspiracy.

Plaintiff has failed to raise any substantial question as to the constitutionality of NH RSA 284:6-a, 12-a, 15-a, 15-b and 16-a. Her request for the convening of a Three-Judge Court is accordingly denied.

Plaintiff has not alleged that defendants acted with any racial or class-based animus and, therefore, her claims under 42 U.S.C. §§ 1982 and 1985 fail and are dismissed. *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

Plaintiff has failed to plead any facts from which a conspiracy, a necessary element under 42 U.S.C. § 1985, can be inferred. "[T]he bare use of the word 'conspiracy' with no supporting

facts . . ." is not sufficient. *Moran* v. *Bench*, 353 F.2d 193, 195 (1st Cir. 1965); *see*, *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 102-3.

42 U.S.C. § 1984 concerns review by the United States Supreme Court of cases arising under other provisions of the Civil Rights Act and does not apply to claims for relief. Accordingly, plaintiff's claim under Section 1984 is dismissed.

Defendants Rudman and Hess have moved, pursuant to F.R.C.P. 12 (b) (6), to dismiss all plaintiff's claims as to them. This motion is granted. The only claim that is sufficiently viable to require close scrutiny is the one under Section 1983 alleging a violation of the plaintiff's right to a due process hearing. It is clear from the complaint that defendants Rudman and Hess did not participate in any way in this refusal. It is the Racing Commission that has acted in an allegedly unconstitutional manner. Plaintiff has alleged no facts from which this court can find a claim against Rudman and Hess under 42 U.S.C. § 1983. The action against them is accordingly dismissed.

In order to determine whether plaintiff's claim states a cause of action against defendant members of the New Hampshire Greyhound Racing Commission under 42 U.S.C. § 1983, I must first decide whether it involves a constitutionally protected right. *Raper* v. *Lucey*, 488 F.2d 748 (1st Cir. 1973). The basic issue is whether the defendant New Hampshire Greyhound Racing Commission is required, under the due process clause of the Fourteenth Amendment, to provide an applicant for a license to operate a Greyhound race track a due process hearing before denying or granting such application.[1] I hold that it is not so required.

---

1. Although, under the facts of this case, plaintiff technically was not an applicant, her position is the same. NH RSA 284:16-a (Supp. 1975) provides in part:

> The license of any corporation shall automatically cease upon the change in ownership, legal or equitable, of fifty percent or more of the voting stock of the corporation and the corporation shall not hold a dog race or meet for public exhibition without a new license.

Since the plaintiff would be acquiring at least fifty percent interest in a licensed race track, she was, as a practical matter, applying for a license to operate the New Hampshire Kennel Club.

In a due process analysis, the first step must be to consider whether the plaintiff has alleged a "deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972). Because it is unclear from the pleadings whether plaintiff is claiming an infringement of her property or liberty, I will examine the parameters of both.

The Fourteenth Amendment's protection of property is broad but not infinite and has been limited by the Supreme Court to "interests [in which] a person has already acquired . . . specific benefits." *Roth, supra*, 408 U.S. at 576.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.* at 577.

The Court further noted that property interests

> are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *op. cit.*

A claim of entitlement can arise where state law or practice creates a property interest which an individual has secured or where the individual relies on the continued existence of the "property" in his daily life. A state employee has a "claim of entitlement" in his continued employment and is constitutionally protected from summary dismissal. *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). A nontenured state teacher may rely on "mutually explicit understandings" concerning renewal of his annual contract and thus acquire a "property" interest in his continued employment. *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972). A licensed driver has a property interest in the continued possession of his license because "possession may become essential in the pursuit of a livelihood." *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). A welfare recipient is entitled to continued welfare benefits so long as he continues to meet the statutory criteria. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Finally, a student has a claim of entitlement created by state law to remain in school. *Goss* v. *Lopez*, 419 U.S. 565 (1975).

Here, plaintiff has not acquired by virtue of her application any entitlement to a race track license. She does not have a property interest cognizable under state law, rules, custom, or understanding. State law does not create any property interest in race track license applicants; the law is explicitly permissive, and the New Hampshire Supreme Court has upheld the horse race track statute on those very grounds. NH RSA 284:16-a; *North Hampton &c. Assn.* v. *Commission*, 94 N.H. 156 (1946). Neither can plaintiff claim any "understanding." In her contractual dealings with the Kennel Club, she expressly acknowledged the statutory necessity of obtaining a license in order to participate in the operation of the race track.

Plaintiff cannot claim an entitlement by way of necessity because she is not dependent to any degree in her daily life on being allowed to participate in the license. She is seeking a tax shelter, not a means of livelihood. I rule that the plaintiff does not have a cognizable property interest under the Fourteenth Amendment.

The Fourteenth Amendment also protects "liberty" but, here again, the range of protectible interests is not unlimited. It encompasses fundamental or natural rights, "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Such privileges include the right to earn a living and the right to engage in the occupation of one's choice. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). Plaintiff, here, does not seek nor is she being prevented from either earning a living or engaging in a chosen occupation. While no suggestion is made that the use of the race track as a tax shelter is illegal, it is clear that the desire to save taxes does not rise to the level of a constitutionally protected right.

Plaintiff, in broad brush strokes, alleges that defendants have infringed upon her protected rights to contract and to hold real and personal property, but she does not allege, as indeed she cannot, that they have in any way interfered with either her present contract with the Kennel Club or her right to enter into contracts in the future.

"Liberty" also includes plaintiff's interest in her good name and reputation. The rejection of plaintiff's application neces-

sarily reflects the Commission's opinion that she is not suitable to participate in operating a Greyhound race track in the State of New Hampshire. The question is whether such unstated but plainly understood reflection of the Commission's opinion of plaintiff rises to the level of a constitutional deprivation of liberty. Plaintiff's "good name, reputation, honor, or integrity" and standing in her community are not at stake merely because defendants rejected her application; New Hampshire is not plaintiff's community. No charge has been leveled against plaintiff. *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). This is not a situation where plaintiff will be stigmatized as a wrongdoer. *Hogge* v. *Hedrick,* 391 F. Supp. 91, 110 (E.D. Va. 1975). Moreover, plaintiff has not claimed or alleged any facts from which I can infer that her reputation or good name have, in fact, been damaged by defendants' rejection of her application. She is certainly in no worse position than a teacher whose contract has not been renewed. *See, Board of Regents* v. *Roth, supra,* 408 U.S. at 573.

I note that there are cases in which applicants for licenses have been found to have protectable interests even though the claimants are mere applicants. In *Raper* v. *Lucey, supra,* 488 F.2d 748, the First Circuit found that a driver's license applicant has a protected liberty interest in the "freedom to make use of one's own property, here a motor vehicle." *Id.* 488 F.2d at 752, quoting *Wall* v. *King,* 206 F.2d 878, 882 (1st Cir. 1953). Whether the privilege of using one's car is denominated a liberty interest (*Raper, id.*) or a property interest (*Bell* v. *Burson, supra,* 402 U.S. 535), it is a privilege clearly different from the one plaintiff seeks to obtain. A driver's license and the concomitant use of a motor vehicle are often "essential in the pursuit of a livelihood." *Id.,* 402 U.S. at 539. Here, the license plaintiff seeks would permit her to accomplish a tax shelter; it is in no way essential to her survival or to the conduct of her daily affairs. In *Hornsby* v. *Allen,* 326 F.2d 605 (1964), a pre-*Roth* case, the Fifth Circuit found that an applicant for a liquor license is entitled to due process. Again, the liquor license can be differentiated from the racing license plaintiff seeks because the liquor license may be essential to a livelihood. The same reasoning applies to *Homer* v. *Richmond,* 292 F.2d 719 (D.C. Cir. 1961), in which radio telegraph operators had unsuccessfully sought licenses made

necessary by a newly enacted statute. The Circuit Court found that once an operator meets the statutory criteria, he is entitled to a due process hearing to meet charges of unsuitability. Besides involving a license necessary for the pursuit of a chosen career, *Homer* involved charges of "seditious" affiliations and activities. As noted above, the plaintiff is not seeking a license necessary to enable the pursuit of a livelihood, nor is she seeking to clear her name or reputation of accusations or charges. I do not find these cases dispositive of this situation.

In conclusion, I find that plaintiff has failed to state a claim upon which relief can be granted. She has not alleged a deprivation of any interest protected by the due process clause of the Fourteenth Amendment.

While it may seem unfair that the plaintiff has had her license application rejected without a statement of reason and without a due process hearing, I must point out that, under the pertinent New Hampshire statute, plaintiff did have a right to appeal the decision of the Greyhound Racing Commission to the New Hampshire Superior Court. NH RSA 284:13 specifically provides:

> Any party aggrieved by any final decision entered in proceedings before the commission may, within ten days after such decision is entered, appeal to the superior court by petition specifying the grounds upon which said decision is claimed to be unreasonable or unlawful.

It would appear that the plaintiff had an adequate remedy in the state courts of New Hampshire which she did not invoke.

The complaint is dismissed for failure to state a claim upon which relief can be granted. F.R.C.P. 12 (b) (6).

SO ORDERED.

/s/ Hugh H. Bownes

United States District Judge

January 9, 1976

cc: Attorney General
E. Paul Kelly, Esq.
Leonard W. Yelsky, Esq.

IV. COMPLAINT OF GERALDINE C. MEDINA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

GERALDINE C. MEDINA)
One Bratenahl Place
Bratenahl, Ohio 44108)
Plaintiff,)
-vs-)

WARREN B. RUDMAN)
c/o The Attorney General's Office
State House)
Concord, New Hampshire

DAVID HESS)
c/o The Attorney General's Office
State House)
Concord, New Hampshire

ROBERT E. ALLARD)
c/o State of New Hampshire
Greyhound Racing Commission)
Room 404, Four Park Street
Concord, New Hampshire)

SYDNEY H. FRINK)
c/o State of New Hampshire
Greyhound Racing Commission)
Room 404, Four Park Street
Concord, New Hampshire)

SOTERIOS A. SAGGIOTES)
c/o State of New Hampshire
Greyhound Racing Commission)
Room 404, Four Park Street
Concord, New Hampshire)

Defendants.)

COMPLAINT

(JURY DEMAND ON COUNT II)
C 75-297

COUNT I.

1) Plaintiff is a citizen of the United States of America and a resident of the City of Bratenahl, Cuyahoga County, Ohio.

2) Each of the Defendants herein are citizens of the State of New Hampshire.

3) The Defendant, Warren B. Rudman, is now and was at all times material hereto the duly appointed Attorney General of the State of New Hampshire. The Defendant, David Hess, is now and was at all material times herein complained of a duly appointed Assistant Attorney General for the State of New Hampshire. Each of the remaining defendants, namely Robert E. Allard, Sydney H. Frink and Soterios A. Saggiotes, were each, during all times material hereto, duly appointed members of the State of New Hampshire Greyhound Racing Commission.

4) This is an action for a preliminary injunction and a permanent injunction as authorized by Title 42, United States Code, Section 1982 and 1983 to redress the deprivation under color of statute, regulation, custom or usage of the law, the rights, privileges and immunities secured by the Constitution and laws of the United States. The rights, privileges, and immunities sought to be protected are those secured by the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks to restrain and enjoin Defendants and others working under the direction of Defendants and under the control of Defendants from enforcement, operation, and execution of the below described sections of the New Hampshire (RSA ch. 284), namely: Title XXIV, Chapter 284, Sections 6-a, 12-a, 15-a, 15-b, 16-a and certain administrative action taken pursuant to the above referred to New Hampshire statutes as taken by the Defendants in this action, all of which deprive Plaintiff herein of her constitutional right to earn a living and to purchase and hold real and personal property.

5) Jurisdiction is conferred on this Court by 28 U.S.C. §1343 Subdivisions (1), (2), (3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. §1982, §1983 and §1985; jurisdiction is further conferred on this Court

by 28 U.S.C. §2201 and 2202 relating to declaratory judgments and by 28 U.S.C. §2281.

6) This is an action for a declaratory judgment pursuant to Title 28, United States Code, Section 2201, declaring that the following sections of the New Hampshire Revised Statutes Annotated as they were administratively applied in the case of the deprivation of licensing privileges to Plaintiff herein, were applied unconstitutionally by virtue of which they effectively deprived Plaintiff of her property without due process of law. The above referenced statutes are set forth below:

(RSA 284:6-a) :

"I. There shall be a state greyhound racing commission consisting of three members appointed by the governor with the advice and consent of the council. Not more than two members shall belong to the same political party. Each shall hold office for a term of three years and until his successor has been appointed and qualified. Any vacancy shall be filled for the unexpired term. One member shall be appointed as chairman and one as secretary. No member shall have any pecuniary interest in any racing or in the sale of pari-mutuel pools licensed hereunder.

"II. The greyhound racing commission is independent of and separate from the state racing commission and is hereby granted the same powers, rights, duties and responsibilities granted the state racing commission under the RSA, to the extent such grant is necessary to implement the provisions of this chapter relative to greyhound racing. Any reference to the state racing commission in the RSA shall be deemed to refer to the greyhound racing commission, if appropriate to carrying out such purpose, provided that specific provisions of the RSA referring to dog racing shall govern where applicable."

(RSA 284:12-a) :

"The greyhound racing commission shall make rules and regulations for the holding, conducting and operating of all dog races or meets for public exhibition and for the operation of race tracks on which any such race or meet is held. No person, association, or corporation shall conduct, hold or operate any dog race or meet for public exhibition, at which pari-mutuel pools are sold, without a license from the commission."

(RSA 284:15-a) :

"Any person, association, or corporation desiring to hold a dog race for public exhibition at which pari-mutuel pools are to be sold, shall apply to said commission for a license to do so. The application shall be signed and sworn to by the person or executive officer of the association or corporation and shall contain the information set forth in section 15. Any New Hampshire agricultural fair association certified as such, by the commissioner of agriculture, shall be entitled to one special six day racing license annually."

(RSA 284:15-b) :

"Any person, association or corporation applying for or holding a license issued pursuant to the provisions of this chapter shall file annually, not later than December thirty-first, with the attorney general a complete and detailed written statement, signed under oath, by the applicant or holder of such license, if an individual, or by the officers of the applicant or holder of such license, if an individual, or by the officers of the applicant or holder, if a corporation or an association, containing in addition to such information as the commission may prescribe by rule or regulation the following:

"I. The name, residence address and nature of the ownership interest, including where applicable the number of shares of stock held and, if known, how obtained, of every person who possesses an ownership interest in such license applicant or holder.

"II. The name, address, present principal occupation or employment and the name and principal business of any corporation or other organization in which such employment is carried on of every director, officer and holder of ten percent or more ownership interest in such license applicant or holder; and

"III. The name and all information which license applicant or holder has or might reasonably be expected to have as to any felony convictions of any officer, director or holder of an ownership interest of any degree; provided, that if said license applicant or holder is an association or corporation in which twenty-five or fewer individuals or organizations hold an ownership interest or stock then the information required by paragraphs I, II and III hereof shall be provided by each such interest holder or stockholder, who shall be further required to submit a detailed statement of his assets and liabilities on forms prescribed by the attorney general.

(RSA 284:16-a):

"If the greyhound racing commission is satisfied that all the provisions hereof and the rules and regulations prescribed have been and will be complied with by the applicant, it may issue a license which shall expire on the thirty-first day of December. No licensee shall hold more than one license under RSA 284:16 (running or harness horse) while holding a license under this section. The license shall set forth the name of the licensee, the place where the races or race meets are to be held, and the time and number of days during which racing may be conducted by said licensee. Any license issued shall not be transferable nor assignable. Said commission shall have power to revoke any license for good cause upon reasonable notice and hearing. The commission may at any time for cause require the removal of any employee or official employed by any licensee hereunder. The license of any corporation shall automatically cease upon the change in ownership, legal or equitable, of fifty percent or more of the voting stock of the corporation and the corporation shall not hold a dog race or meet for public exhibition without a new license. Any New Hampshire agricultural fair association certified as such, by the commissioner of agriculture, shall be entitled to one special six day license annually to hold a dog race meet."

The administrative action taken by the Defendants herein under RSA Chapter 284, was unconstitutional in that each of the Defendant members of the New Hampshire Greyhound Racing Commission illegally delegated his authority to the Defendants, Warren B. Rudman and David Hess, and the Defendants, Warren B. Rudman and David Hess, illegally acted under such power and illegally unconstitutionally convinced each of the Defendant members of the New Hampshire Greyhound Commission to put in writing their order failing to "approve Geraldine C. Medina as a financial backer, owner, or participant in any way under the license granted to the New Hampshire Kennel Club." A copy of said finding of the New Hampshire Greyhound Racing Commission is annexed hereto and labelled Exhibit "A".

7) This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §2201 and 2202, since it seeks to restrain the Defendants from the enforcement and operation of a statutory scheme set forth above to deprive the Plaintiff of her right to participate in a duly issued New Hampshire Greyhound Racing license, said scheme creating a situation which is repugnant to the Constitution and to the laws of the United States.

8) Plaintiff seeks a temporary restraining order, preliminary injunction, and permanent injunction herein to enjoin Defendants and their agents, servants, employees, attorneys and successors in office from using the aforedescribed sections of the New Hampshire Revised Statutes Annotated under color of law from depriving Plaintiff of her right to participate in a duly issued New Hampshire Greyhound Racing license. Plaintiff further alleges that the aforedescribed provisions of the New Hampshire Revised Statutes Annotated fail to provide Plaintiff with adequate notice and hearing on the merits of a controversy between herself and the unknown contents of the report prepared by Defendants, Warren B. Rudman and David Hess. Said deprivation constitutes a denial of due process of law as set forth in the Constitution of the United States.

9) Each of the Defendants named herein separately and in concert, acted outside the scope of his jurisdiction and without authorization of law and each of the Defendants, separately and in concert, acted willfully, knowingly and improperly with the specific intent to deprive Plaintiff of her constitutional rights.

10) Plaintiff says further that each and all of the acts of the Defendants alleged herein were done by Defendants, and each of them not as individuals but under the color and pretense of the statutes and administrative regulations of the State of New Hampshire and under their authority as state officers.

11) Prior to the 14th day of May, 1975, Plaintiff was approached by the two principal shareholders of the New Hampshire Kennel Club, Inc. (hereinafter referred to as the "Club"), namely, Henry D. Bogatin, Jr. (hereinafter referred to as "Bogatin") and Angelo Cassaro (hereinafter referred to as "Cassaro"), a corporation owning real estate upon which a greyhound racing track was ultimately built. The Greyhound Racing Commission of New Hampshire (hereinafter referred to as "Commission") had on the 29th day of July, 1974 issued to said Club a license to conduct greyhound races. A copy of said license is annexed hereto and labelled Exhibit "B" and had certified this fact on the 21st day of April, 1975 (see Exhibit "C" annexed hereto and made a part hereof.) The above said Bogatin and Cassaro in-

formed Plaintiff that said Club was in need of financial assistance and Plaintiff agreed to loan said Club a substantial amount of money, namely, ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00). Because of Plaintiff's substantial financial position, the said Bogatin and Cassaro agreed to sell Plaintiff an approximate fifty percent (50%) interest in said Club, all of said sale being contingent upon Plaintiff obtaining approval from the Commission. A copy of a memorandum prepared by counsel for Bogatin and Cassaro evidencing this fact is annexed hereto and labelled Exhibit "D".

12) Pursuant to the agreement in principal that was entered into by Plaintiff and Bogatin and Cassaro, Plaintiff loaned to the said Club an approximate amount of SEVEN HUNDRED THOUSAND DOLLARS ($700,000.00).

13) In further pursuance of the agreement that Plaintiff reached with Bogatin and Cassaro, she incurred accounting and legal fees, the exact amount of which at the present time exceeds TEN THOUSAND DOLLARS ($10,000.00) and which are likely to increase significantly in the future by virtue of the combined illegal acts of the Defendants herein.

14) Plaintiff in accordance with her agreement with Bogatin and Cassaro retained attorney Joseph A. Millimet to file for her an application to participate in the previously issued Greyhound Racing license as set forth above. A copy of Plaintiff's Application is annexed hereto, made a part hereof, and labelled Exhibit "E".

15) Plaintiff says further that subsequent to Plaintiff's application to be licensed to participate in said Club license, the Attorney General conducted some type of investigation and in which Plaintiff cooperated fully by giving a long detailed statement to Defendant Warren B. Rudman's assistant, David Hess. The results of this Attorney General investigation was kept secret from Plaintiff, but Plaintiff believes that said investigation is the basis for Plaintiff's being turned down as a participant in the aforedescribed Club's license.

BEST COPY AVAILABLE

16) Plaintiff says that she has a reputation unblemished in any way and Plaintiff further says that she complies with any of the standards as set forth in New Hampshire Revised Statutes Annotated, Chapter 284 and all related sections thereto, but that all of the Defendants acting independently, collectively and in concert illegally under color of law rejected Plaintiff's aforesaid application.

17) Plaintiff says further that the aforedescribed statutes of New Hampshire and the administrative activity conducted thereunder by the Defendants herein were an illegal and unconstitutional method of depriving the Plaintiff of her constitutional rights.

18) Plaintiff says further that she has a substantial investment in excess of Seven Hundred Thousand Dollars ($700,000.00) out-of-pocket money at stake by virtue of the illegal unconstitutional acts of all of the Defendants herein and that she will suffer immediate and irreparable harm unless this Court issues a temporary restraining order and further injunctive relief that Plaintiff seeks herein.

19) Plaintiff shows that there exists an actual controversy between the parties herein and that Plaintiff is threatened irreparable harm by reason of the acts of the Defendants as set out in her Complaint.

20) Plaintiff further says that she has no adequate remedy at law.

COUNT II.

21) For her second Count, Plaintiff realleges all of the acts set forth in this Complaint as though fully rewritten herein and says further that this action arises under the United States Constitution, particularly under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and under federal law, particularly the Civil Rights Acts, Title 42 of the United States Code, Sections 1982, 1983, 1984 and 1985. This Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code Section 1343 and this Court has venue under and by virtue of Title 28, Section 1391 (B).

22) Each and all of the acts of the Defendants alleged herein were done by Defendants and each of them not as individuals, but under the color and pretense of the statutes and administrative regulations of the State of New Hampshire and under their authority as state officers.

23) Plaintiff says further that the Defendants, Warren B. Rudman, David Hess, Robert E. Allard, Sydney H. Frink, and Soterios A. Saggiotes, acting under color of law and in collusion with each of the other Defendants herein, all acting under color of state law, have proceeded with arbitrary and abusive discretion in refusing to permit Plaintiff to participate in the aforedescribed Club's license, and that said Defendants have further all conspired with one another under color of law to abuse any proper discretion that said Defendants may have had as state officers, and that all of said acts were done in order to deprive the Plaintiff of her constitutional rights to earn a living, to purchase real estate and to freely enter legal contracts, all to her damage in the amount of Three Million, Seven Hundred Thousand Dollars ($3,700,000.00).

WHEREFORE, in connection with Count I, Plaintiff prays that the Court decree and declare that said conspiracy entered into by the Defendants and all acts done pursuant thereto constitute an illegal abuse of power, all done under color of state law; that a three-judge District Court be convened to allow and determine this cause pursuant to 28 U.S.C. 2281 et seq; that the

administrative action taken under RSA Chapter 284: 6-a, 12-a, 15-a, 15-b, and 16-a, be declared unconstitutional and null and void; that the Defendants, their successors in office and all persons acting as their agents, officers and servants, or under their direction or authority be permanently enjoined and restrained from taking any action to enforce the aforedescribed administrative activity which would deprive the Plaintiff of her right to participate in the aforedescribed Greyhound Racing license that was issued to the New Hampshire Kennel Club, Inc.; that the Court declare that the relief sought in Plaintiff's temporary restraining order and preliminary injunction be granted and that the Defendants be compelled to permit Plaintiff to legally participate in the aforedescribed Greyhound Racing license and for such other and further relief as the Court may deem proper and that Plaintiff, upon her second Count be allowed damages in the amount of Three Million Seven Hundred Thousand Dollars ($3,700,000.00), plus Plaintiff's costs of suit herein.

YELSKY, EISEN & SINGER CO., L.P.A.
BY: LEONARD W. YELSKY
340 Leader Building
Cleveland, Ohio 44114

JOHN CULLITY
40 Bay Street
Manchester, New Hampshire 03104

Attorneys for Plaintiff

CERTIFICATE OF COUNSEL

Counsel represents to this Court that he has not attempted to inform Defendants; that it would be a vain act to attempt to have notice of a proposed restraining order served on Defendants; and that it would be a vain act to serve notice of any other requested provisional relief on Defendants.

Plaintiff has suffered, is presently suffering, and will continue to suffer irreparable harm if the actions and conduct of the Defendants, their servants, agents and employees are not halted forthwith. Furthermore, Defendants will suffer no harm, loss, or injury by the staying of their proposed actions, nor will their intended actions be in any way prejudiced should Plaintiff's request be denied.

YELSKY, EISEN & SINGER CO., L.P.A.
BY: LEONARD W. YELSKY
340 Leader Building
Cleveland, Ohio 44114

JOHN CULLITY
40 Bay Street
Manchester, New Hampshire 03104

Attorneys for Plaintiff

State of New Hampshire

GREYHOUND RACING COMMISSION

Room 404, 4 Park Street

Concord, N. H. 03301

September 26, 1975

N. H. Kennel Club
Route 106
Belmont, N. H. 03220

Attention: Henry D. Bogatin, Jr.

Dear Mr. Bogatin:

This letter confirms our oral advice to you concerning the proposed financing for the New Hampshire Kennel Club.

Based upon a report from the office of the Attorney General, the Commission declines to approve Geraldine C. Medina as a financial backer, owner, or participant in any way under the license granted to the New Hampshire Kennel Club.

Sincerely yours,

N. H. GREYHOUND RACING COMMISSION
Robert E. Allard
Chairman

REA:bl

State of New Hampshire

GREYHOUND RACING COMMISSION

Room 404, 4 Park Street

Concord, N. H. 03301

July 29, 1974

New Hampshire Kennel Club
1508 W. 53rd Street
W. Palm Beach, Florida 33407

Attention: H. Bogatin
A. Cassaro
B. Mates

Dear Sirs:

This is to advise you that the New Hampshire Greyhound Racing Commission met in the Commission Offices on July 29, 1974 and voted unanimously to grant your group a license to construct a greyhound racing facility on the proposed site in Belmont, New Hampshire during 1975.

Dates for racing were not awarded, as this action usually takes place during the month of October.

You may rest assured that you will be kept notified of this pending meeting.

Sincerely yours,

N. H. GREYHOUND RACING COMMISSION
James F. Daly
Director

JFD:bal

State of New Hampshire

GREYHOUND RACING COMMISSION

Room 404, 4 Park Street

Concord, N. H. 03301

April 21, 1975

To Whom it may Concern:

This is to certify that the New Hampshire Kennel Club, a duly registered Corporation in the State of New Hampshire, has been issued a license by the New Hampshire Greyhound Racing Commission to conduct greyhound racing meetings in the town of Belmont, New Hampshire.

Very truly yours,

N. H. GREYHOUND RACING COMMISSION
William T. Hostetter

WTH:bl

NIGHSWANDER, LORD, MARTIN & KILLKELLEY
Attorneys at Law
Laconia, New Hampshire 03246

May 14, 1975

Leonard W. Yelsky, Esq.
340 Leder Building
Cleveland, Ohio 44114

Re: New Hampshire Kennel Club, Inc.

Dear Leonard:

Mrs. Medina has advanced approximately $150,000 to the New Hampshire Kennel Club until it completes its financing through Horowitz Finance Corporation. It is my understanding that the Horowitz Finance Corporation commitment is dependent upon Mrs. Medina's endorsement.

In light of Mrs. Medina's substantial assistance with regard to the financing of New Hampshire Kennel Club, Inc. and her potential assistance in the future in the development of the property of the New Hampshire Kennel Club, subject to the approval of the New Hampshire Greyhound Racing Commission, my principals, Henry D. Bogatin, Jr. and Angelo Cassaro, are willing to afford Mrs. Medina an equity position in the New Hampshire Kennel Club, Inc. While the details of this arrangement cannot be specified at this time, it is the feeling of my principals that Mrs. Medina's interest should be approximately 50% of the equity of the company.

My principals look forward to continuing to work with Mrs. Medina in this project. Because of the necessity of obtaining the approval of Horowitz Finance Corporation and the New Hampshire Greyhound Racing Commission, and the substantial commitment of time in completing the track prior to July 1, it is not anticipated that these arrangements will be concluded prior to July 1, 1975.

Respectfully yours,

Willard G. Martin, Jr.

WGM/mks
Copy to New Hampshire Kennel Club, Inc.

V. EXCERPT FROM PAGE TWO OF DISTRICT COURT HEARING ON ALL PENDING MOTIONS, DECEMBER 5, 1975

"' The Court: What do you mean by further equitable relief?

"' Mr. Yelsky: Well, all right. This is exactly what I mean. We have very carefully brought to the Court's attention that this woman has never been given a hearing or notice or an explanation of why she has not been licensed, although we feel that she has complied in every way with the State law and that she should be licensed.

"' The Court: All right. Are you asking that she be given a hearing?

"' Mr. Yelsky: That is the further equitable relief, Your Honor.'"

VI. AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
USCS Constitution, Amendment V, Page 1.

VII. AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. USCS Constitution, Amendment XIV, page 444.

VIII. TITLE 42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 USCS § 1983, page 219.

Supreme Court, U. S.
FILED
SEP 14 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1976

No. 77-230

GERALDINE C. MEDINA, Petitioner,

v.

WARREN B. RUDMAN, DAVID HESS, ROBERT E. ALLARD, SYDNEY H. FRINK, and SOTERIOS A. SAGGIOTES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

THE STATE OF NEW HAMPSHIRE

David H. Souter
Attorney General

James C. Sargent, Jr.
Assistant Attorney General

State House Annex
Concord, New Hampshire
03301

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JURISDICTION

The Court of Appeals for the First Circuit entered its decision affirming the District Court for the District of New Hampshire, on November 9, 1976. Petitioner's petition for Writ of Certiorari was docketed with this Court on August 10, 1977, more than nine months after the First Circuit's decision, and well outside of the three-month period set forth in 28 U.S.C. §2101 (1975). Under that statute the petition is, manifestly, untimely, and this Court is therefore without jurisdiction to review the decision of the Court of Appeals in this case. See Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943).

STATEMENT OF THE CASE

Petitioner brought suit against Respondents in the District Court for the District of New Hampshire, claiming a cause of action under 42 U.S.C. §§1982 through 1985 (1970) and under 28 U.S.C. §§2201 and 2281 (1970). Petitioner alleged that Respondents' actions in administering certain provisions of the New Hampshire Greyhound Racing statute, RSA 284:6-a, 12-a, 15-a, 15-b and 16-a (Supp. 1975) (the "Racing Statute") deprived her of rights guaranteed by the First and Fourteenth Amendments.[1/] On motion of the Re-

---

1/ Despite Petitioner's claim in paragraph 21 of her Complaint that her cause of action arises under the First Amendment, nowhere else do her pleadings even suggest that her interests in free speech, in the free exercise of religion or in an ability to assemble with others to petition for redress of grievances have been jeopardized.

spondents the District Court dismissed Petitioner's Complaint under Rule 12 (b)(6) of the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") for failure to state a claim on which relief could be granted. Medina v. Rudman, No. 75-297 (D.N.H. Jan. 9, 1976). On appeal the First Circuit affirmed 545 F.2d 244 (1976). The Circuit Court's decision was dated November 9, 1976.

In her Complaint Petitioner claimed that some time in the early spring of 1975 she learned about the New Hampshire Kennel Club, Inc., (the "Club"), a corporation licensed by the New Hampshire Greyhound Racing Commis-

1/ continued from page 2

Both the District Court and the Court of Appeals ignored Petitioner's reference to the First Amendment and she does not contest that action here.

sion (the "Commission"), to operate a greyhound racetrack in Belmont, New Hampshire. In an Affidavit filed with her Complaint Petitioner states that she decided to respond to the Club's need for funds by making an investment in the Club because she thought the greyhound racing business would be a good investment and would afford her a tax shelter. She alleges that she lent an initial sum of money to the Club and that she agreed to make a further and more substantial loan under an agreement with the principals in the Club to sell her a 50 percent stockholder interest in the Club, provided that she obtained the approval of the Commission for her involvement as an equity owner in the corporation.

An exhibit filed with Petitioner's

pleadings indicated that a limited partnership would be formed in which Petitioner would be a limited partner and in which the general partner would be the Club reorganized with two classes of stock, voting and nonvoting. In addition to her limited partnership interest, the people involved contemplated that Petitioner would hold some 43 percent of the voting stock in the corporation as reorganized and 100 percent of the nonvoting stock.[2/]

[2/] Since it is not clear whether the nonvoting stock would be issued in place of then outstanding voting stock, it is not apparent whether the reorganization so contemplated would have resulted in "the change in ownership, legal or equitable, of fifty percent or more of the voting stock of the corporation," within the meaning of RSA 284:16-a (Supp. 1973), with the result that the license held by the Club would "automatically cease," under that section. As a practical matter, Petitioner was in the position of a license applicant before the New Hampshire Racing Commission.

Both the memorandum of this contemplated partnership arrangement and a letter from the Club's lawyer to Petitioner's lawyer, filed as part of her pleadings, made any contemplated investment arrangement involving stock ownership in the corporation contingent upon approval by the Commission of Petitioner as a stockholder. Under the terms of the contract, no action was contemplated and no obligation was incurred which was not subject to the condition of this approval. Early in August of 1975 Petitioner's former New Hampshire counsel filed on her behalf an application to "participate" in the Club's outstanding greyhound racing license. The application indicated that the Petitioner was at that time the holder of a mortgage from the Club to secure a loan "in the

approximate amount of $700,000.00." The Attorney General performed an investigation of the sort made of applicants for greyhound racing licenses and at its conclusion advised the Commission of its results. Based upon those results, the Commission in September, 1975, declined "to approve Geraldine C. Medina as a financial backer, owner, or participant in any way under the license granted to the New Hampshire Kennel Club." This action by the New Hampshire Greyhound Racing Commission was the gravamen of Petitioner's suit.

ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE THAT SHE HAS SUFFERED THE ABRIDGEMENT OF ANY INTEREST PROTECTED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Although the Constitution does not indicate with exactness what interests fall within the terms "liberty" and "property," this Court has, from time to time, determined whether particular interests are encompassed by the concepts. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 570 (1972). This Court has held in cases discussed below that an interest protected by the Due Process Clause must be an interest in one of those natural rights universally recognized as a fundamental aspect of individual freedom, or in a benefit actually vested in the claimant under the authority of state law, or in a

benefit to which he can claim to be entitled as one member of a broad class created by state law, rule or understanding. Petitioner has demonstrated no abridgement of any such interest.

1. Cognizable Interests in Liberty

To plead the abridgement of an example of "liberty" which may not be abridged without due process of law, a plaintiff must plead one of the following:

(a) The abridgement of a natural right, and an abridgement to a substantial degree; or

(b) The termination of some right to unfettered conduct conferred by state law, rule or understanding.

(a) Natural Rights and Their Substantial Abridgement.

In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), this Court stated that the liberty protected under the Fourteenth

Amendment

> . . .denoted not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

See also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). The language and the holdings in these cases indicate that the aspects of liberty subject to protection as fundamental rights are rights to choose the kind of person one will be

and will bring up his children to be. These are the rights without which we would not commonly call men free.

Just as the aspect of liberty must be fundamental to attain cognizance under the Due Process Clause so an abridgement of it must be substantial before a court can find such a deprivation as to entitle a plaintiff to relief. In Board of Regents v. Roth, supra, this Court was confronted with a state law scheme which left to the "unfettered discretion" of the state university the decision whether or not to rehire an untenured teacher. The scheme required only that the teacher be informed about the decision concerning retention or nonretention; no statements of reasons for nonretention were required. But this Court held that although the state declined to rehire a nontenured teacher,

in effect, preventing him from engaging in one of the "common occupations of life," Meyer v. Nebraska, supra, at 399, it had not infringed his personal liberty to a constitutional degree. Roth had only been denied one opportunity to engage in the chosen occupation and was perfectly free to find other such opportunities anywhere else in the state. He could not therefore find solace in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the plaintiff, who had been denied admission to the state bar, had been prevented from pursuing the entire range of employment opportunities available in the state in the chosen occupation.

(b) The Termination of a Right to Unfettered Conduct Conferred by State Law, Rule or Understanding.

Clearly the most elemental form of

liberty is freedom from bodily restraint. It is axiomatic that a person may not be deprived of that liberty interest without due process of law. Moreover, once a state has abridged that freedom by imprisonment in criminal cases its return to the prisoner, through eligibility for early release and by actual release on parole is subject to procedural protections. See Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1973).

Liberty in a less literal sense was held to be protected under the Due Process Clause in Wisconsin v. Constantineau, 400 U.S. 433 (1971), where this Court held that an individual had a right to due process prior to implementation of a state scheme that would prevent the sale of intoxicating li-

quors to the individuals. The liberty right to due process accrues because of the state's revocation of a liberty, the right -- extended to the individual as an adult member of the populace at large -- to purchase liquor. See Paul v. Davis, 424 U.S. 693, 708-09 (1976).

These cases establish the proposition that once eligibility for a benefit in the nature of personal liberty has been earned, or once the benefit has been given or recognized under state law or rule, some procedural process is due the beneficiary if the state would withdraw or otherwise curtail the benefit.

2. Cognizable Interests in Property Subject to Procedural Due Process Protection

To plead the abridgement of a property interest subject to procedural due

process protection one must claim an interest in which he or she has more than "an abstract need or desire," more than "a unilateral expectation"; it must be an interest to which he or she has "a legitimate claim of entitlement," an interest "upon which people rely in their daily lives." Board of Regents v. Roth, supra, at 577. The range of interests subject to such protection "is not infinite," and in determining whether an interest falls within the range of protection courts "must look not to the 'weight' but to the nature of the interest at stake." Id. at 570. Protected property interests are "created and . . .defined by existing rules and understandings that stem from. . .[a source independent of the Constitution] such as state law -- rules and under-

standings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577. See also Paul v. Davis, supra, at 710.

A recurring example of a property right in opinions of this Court is the interest of the public employee whose employment carries with it an element of permanence or tenure. In Roth, supra, this Court found that a teacher at a state college had no property right to his employment, and therefore no right to procedural protection upon termination, based on the nature of the contractual arrangement under which he was hired. It was to state law, to the rules of the hiring body and to the terms of the contract of hire that the Court looked to determine what interest was at stake.

In contrast Perry v. Sinderman, 408 U.S. 593 (1972), stands for the proposition that a right to due process exists where a teacher has a justified expectation of some permanence in his employment relationship, even though no tenure is formally recognized. The difference between Perry and Roth was that in Perry rules and understandings promulgated and fostered by state officials provided a basis for the inference that a contractual relationship of a certain derivation could not unilaterally be terminated without some formal procedure; without, that is, some process being due. See also Arnett v. Kennedy, 416 U.S. 134 (1974).

To the same point, Bell v. Burson, 402 U.S. 535 (1971) is authority for the rule that once a state issues drivers'

licenses, the interests in the licenses become vested such that "their continued possession may become essential in the pursuit of a livelihood," id. at 539, and thus they may not be revoked without due process. Similarly this Court has found that there is a property right in the interest of a public school student to remain in school, free of suspension, absent a hearing for due process purposes. Goss v. Lopez, 419 U.S. 565 (1975). The Court has also found a property right in the interest of welfare recipients in continuation of benefits. Goldberg v. Kelly, 397 U.S. 254 (1970).

To summarize these cases, a property interest subject to procedural due process protection is one of the sort people rely upon in their daily lives,

like the interest in security of employment whose terms provide security, the interest in a license to drive one's car, to be taught in a public school and to receive the welfare benefits upon which one's survival has come to depend. The dependencies have come to exist, the interests have become secured, under state laws and the relationships which they authorize; nothing short of laws and practices creating "entitlements" will suffice to bring procedural due process to protect what would otherwise be individual desires, however significant for the individual or worthy of encouragement.

The Fifth Circuit has applied these ground rules in a line of cases dealing with liquor licenses. See South Gwinnett Venture v. Pruitt, 491 F.2d 5

(5th Cir. 1974); Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1963). Although in Hornsby the Fifth Circuit held that a person denied a liquor license was due procedural protections, notwithstanding the state's traditional interest in regulating liquor trade, subsequent cases in that circuit seem to represent a retreat from that holding. See Atlanta Bowling Center, supra, at 714; South Gwinnett Venture, supra, at 7, n. 1. At least one other circuit has rejected the Hornsby result. See Lewis v. City of Grand Rapids, 356 F.2d 267, 286-7 (6th Cir. 1966).

Although Hornsby may have som vitality to the extent that, as in Bell v. Burson, supra, it recognizes the signi-

ficance of individual interest in a license where the licensed activity may be a source of livelihood, its great failing may be in judging the individual interest in the abstract rather than in the proper social context. As this Court has made abundantly clear, whether a particular individual interest is a property right is related to the weight placed on that interest by society and to society's concern with regulating that interest, as reflected in state laws, rules and understandings.

Thus the individual's interest in an automobile license may be said to be entitled to greater relative weight than the individual's interest in a liquor license, because state regulations with respect to the former are less stringent than with respect to the

latter, because society recognizes that the former is a sine qua non of normal existence whereas the latter may only be granted to a limited number of persons, and because the individual's entitlement to the former is therefore greater. In short, the Fifth Circuit may have failed to adequately analyze whether Mrs. Hornsby had a justified expectation of a liquor license and may have accorded greater weight to her interest in the license than was due.

3. Petitioner Did Not Plead an Interest Recognized as a Liberty or Property Interest Subject to Procedural Due Process Protection

The foregoing sections describe three types of interests, be they called liberty or property interests, subject to procedural due process protection: (a) interests in natural rights when

substantially infringed, (b) interests in continued freedom of conduct granted by the state, and (c) interests secured or the subjects of entitlement under state law. Petitioner's various claims should be assessed from the standpoint of this list since it provides an indication of what interests have been found to be constitutionally cognizable rights.

(a) Petitioner Did Not Plead a Substantial Abridgement of a Natural Right.

While the right to earn a living would seem to fall within the broad listings set out in Meyer v. Nebraska, supra, Petitioner's right to earn a living was never abridged or even threatened by the State of New Hampshire. Petitioner's pleadings show that she earns approxinately $450,000.00 a year in a business unrelated to greyhound

racing. She sought involvement in the greyhound racing business as an investment and because she wished to obtain a tax shelter. There is here no denial of a natural right to earn a living any more than there was in Roth: Roth could teach elsewhere, the Petitioner can invest and seek tax shelters elsewhere and she can obviously earn a living.

Moreover, while a right to contract or to invest in general may well be cognizable under the Constitution, Petitioner seeks not to vindicate a general right, she seeks, rather, to invest in a particular enterprise of a sort unknown in our society except when and under the conditions that states allow it to exist. It is simply error to claim there is a natural right to in-

vest or to do anything else in relation to racing. Contracts by otherwise able people to go to parochial schools and to drive cars can be said to be part of the American birthright; but not contracts whose objects are to make money from racing dogs.

(b) Petitioner Pled no Abridgement of a Liberty Affirmatively Granted by the State.

This category of procedurally protected interests is not arguably relevant to this case. If somehow Petitioner has been granted a special right to engage in dog racing, the State could not withdraw that right without affording procedural due process, based on Bell v. Burson, supra, and on analogy with Wolff v. McDonnell, supra, Morrissey v. Brewer, supra. But the essence

of her claim is that she has been granted nothing. She is in no position to claim the process due someone from whom a right once granted has been withdrawn.

(c) Petitioner Did Not Plead a Loss of an Interest Secured by State Law, or to Which State Law Entitled Her.

Under Paul v. Davis, supra, rights to which an individual is entitled under state law may be said to include all natural rights, as rights which, in the absence of any regulation restricting their exercise, have been "recognized" under state law. Such rights would include the interest in being free to purchase liquor, as in Constantineau, or the interest in being able to seek jobs as one of the general public free from any state-imposed stigma referred to in Roth. But, as we have already stated,

Petitioner has pled no substantial abridgement of such natural rights.

This Court has recognized some paradigm examples of interests secured by state law, interests subject to entitlement so as to carry due process safeguards: interests of teachers given positions of some permanence to keep them; interests of children of appropriate ages and qualifications to continue school; interests of qualified drivers to drive and of poor people to continue to receive welfare benefits. The interest in racing dogs differs from the interests in these examples in two fundamental respects.

First, the interest in racing dogs is socially trivial while the interests in going to school and in having money to buy food and shelter are fundamen-

tally important to life in our society. To be sure, the Petitioner has a desire to effectuate her interests in racing dogs for profit; her pleadings on their face demonstrate "a unilateral expectation" that she obtain what she desires. Board of Regents v. Roth, supra, at 577. But it does not require more to demonstrate that the interest in racing dogs is not one "upon which people rely in their daily lives." Id. The interest of the deterred racetrack owner does not rise to constitutional significance for purposes of procedural due process.

Second, each of the examples given of interests protected were subject to the claim that a state law, or rule with legal significance, acted as a criterion under which the claimant could be said to be entitled to enjoy the inter-

est. The law obligates the government to provide a public education to children who can attend school and have the capacity to learn. The law provides a driver's license to those who can pass tests of competence. The law provides welfare benefits to those with too little income and no capacity to earn it. The claimants to these interests can claim they have met the criteria for eligibility and they ought therefore to have the promised benefits. But the Petitioner claims no such interest. The Racing Statute contains no criteria of eligibility; nor do regulations of the Commission; nor does an analysis of the Commission's conduct. The Racing Statute does not define eligibility. It does not state criteria. It does not entitle anyone to anything at all.

The Petitioner may think that there should be criteria of eligibility for racing licenses; but the Constitution of the United States does not require any, and consequently it does not require that procedural due process be afforded to those who apply for licenses without success. Respondents have taken away nothing which the law had secured to Petitioner, they have refused her nothing to which she is entitled. Their actions give rise to no claim under the Fourteenth Amendment.

CONCLUSION

Petitioner failed to state any claim upon which relief can be granted. The decision of both the District Court and the Court of Appeals were entirely correct and proper. Moreover, the petition for Writ of Certiorari is not timely. The petition should therefore be denied.

Respectfully submitted,

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September 13, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1977, a copy of the foregoing Memorandum for Respondents was mailed, postage prepaid, to Leonard W. Yelsky, Esquire and David A. Snow, Esquire, counsel for Petitioner.

James C. Sargent, Jr.